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No. 731

In the Supreme Court of the United States

October Term, 1959

THE UNITED STATES OF AMERICA, APPELLANT

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of New York

Civil Action No. 32. Consolidated Cause

UNITED STATES OF AMERICA, PLAINTIFF, HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., INTERVENING PLAINTIFFS

v.

ROCK ROYAL CO-OPERATIVE, INC., ET AL., DEFENDANTS

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, the United States of America, plaintiff-appellant in the above-entitled cause, presents the following statement in connection with its petition for the allowance of an appeal to the Supreme Court of the United States from the decree entered herein on March 21, 1939:

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 2 of the Act of August 24, 1937,

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Public No. 352, 75th Congress, 50 Stat. 751, 28 U. S. C., Section 349a, which reads as follows:

> In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section

shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

(b) There is involved in this case the validity f certain provisions of the Act of Congress approved May 12, 1933, Public, No. 10, 73d Congress, 8 Stat. 31, 7 U. S. C. A., Chap. 26, as amended y the Act of Congress approved August 24, 1935, Public, No. 320, 74th Congress, 49 Stat. 750, and s reenacted and amended by the Act of Congress approved June 3, 1937, known as the Agricultural Marketing Agreement Act of 1937, Public, No. 137, 75th Congress, 50 Stat. 246, a compilation of the pertinent provisions of the aforesaid Act of Congress approved May 12, 1933, as mended by the aforesaid Act of Congress, approved August 24, 1935, and as reenacted and mended by the aforesaid Act of Congress approved June 3, 1937, is appended hereto as Exibit A.

(c) The final decree of the United States District Court for the Northern District of New York, review of which is sought by the appeal herein, as signed March 21, 1939, and entered March 21, 939, and the application for appeal is presented ntemporaneously with the presentation of this atement, to wit: on the 21st day of March 1939.

(d) The nature of the case and the rulings of e Court are such as to bring this case within the risdictional provisions relied on because the

United States is a party to this case and the decision of the District Court is against the constitutionality of an Act of Congress, namely, the Act of Congress approved May 12, 1933, as amended by the Act of Congress approved August 24, 1935, and as reenacted and amended by the Act of Congress approved June 3, 1937, a compilation of the pertinent provisions of which is appended hereto as Exhibit A. The District Court held that the provisions of Section 8c (5) (B) (ii) of said Act (Exhibit A, p. 4) which authorize the Secretary of Agriculture to issue an order "providing for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered," and the provisions of Section 8c (5) (F) of said Act (Exhibit A, p. 5) which provides that no order shall "prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the 'Capper-Volstead Act,' engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers," are violative of the Fifth Amendment to the Constitution of the United

States, and that the provisions of Section 8c (5) (B) (ii) of said act are unauthorized by the Constitution or by the Commerce Clause thereof.

The following case is believed by plaintiff to sustain the jurisdiction of the Supreme Court:

United States v. *Bekins*, 304 U. S. 27.

(e) There is appended hereto as "Exhibit B" a copy of the opinion delivered by the District Court upon the rendering of the final decree sought to be reviewed. There is appended hereto as "Exhibit C" a copy of the opinion delivered by the District Court overruling plaintiff's motion to strike certain designated paragraphs in the answers of the defendants Schuyler Junction New York Milk Shed Cooperative Association, Inc., Rock Royal Co-operative, Inc., and certain designated paragraphs in the amended answer of the defendant, Jetter Dairy Company, Inc.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General of the United States.

RALPH L. EMMONS,
United States Attorney.

JOHN S. L. YOST,
CHARLES J. MCCARTHY,
Special Assistants to the Attorney General,

E. O. MATHER,
Principal Attorney,
Department of Agriculture.

EXHIBIT A 7

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

OTATED COMPILATION OF AGRICULTURAL MARKETING GREEMENT ACT OF 1937 REENACTING, AMENDING AND UPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS MENDED [1]

AN ACT

eenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

e it enacted by the Senate and House of Representatives of United States of America in Congress assembled, that the owing provisions of the Agricultural Adjustment Act, as nded, not having been intended for the control of the pro-tion of agricultural commodities, and having been intended e effective irrespective of the validity of any other provision hat act are expressly affirmed and validated, and are reen-d without change except as provided in section 2:

) Section 1 (relating to the declaration of emergency);

DECLARATION

is hereby declared that the disruption of the orderly exchange ommodities in interstate commerce impairs the purchasing power armers and destroys the value of agricultural assets which sup-the national credit structure and that these conditions affect sactions in agricultural commodities with a national public rest, and burden and obstruct the normal channels of interstate merce.[2]

b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

EC. 2. It is hereby declared to be the policy of Congress—

1) Through the exercise of the powers conferred upon the Secre-of Agriculture under this title, to establish and maintain such *erly marketing conditions for agricultural commodities in inter-e commerce as will establish* [3] prices to farmers at a level that give agricultural commodities a purchasing power with respect

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or annotations to the Agricultural Adjustment Act, as amended; for provisions of that ot reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; for other acts of Congress relating both to the Agricultural Adjustment Act, as ded, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Com-ion of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the of the First Session of the 74th Congress, August 26, 1935"; Superintendent of uments, Washington, D. C.

is amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

it the present acute economic emergency being in part the consequence of a severe and asing disparity between the prices of agricultural and other commodities, which dis-y has largely destroyed the purchasing power of farmers for industrial products, has n down the orderly exchange of commodities, and has seriously impaired the agricul-assets supporting the national credit structure, it is hereby declared that these con-ns in the basic industry of agriculture have affected transactions in agricultural odities with a national public interest, have burdened and obstructed the normal nts of commerce in such commodities, and render imperative the immediate enactment le I of this Act."

he italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing ment Act of 1937, in lieu of the words: "balance between the production and con-tion of agricultural commodities, and such marketing conditions therefor, as will ablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[1] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

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[1] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[5] of milk during a representative period of time.

[5] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs
) and (B) of this subsection (5), providing a method for making
justments in payments, as among handlers (including producers
o are also handlers), to the end that the total sums paid by each
ndler shall equal the value of the milk purchased by him at the
ices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers
om any producer who did not regularly sell milk during a period
30 days next preceding the effective date of such order for con-
mption in the area covered thereby, payments to such producer, for
e period beginning with the first regular delivery by such pro-
cer and continuing until the end of two full calendar months fol-
wing the first day of the next succeeding calendar month, shall be
ade at the price for the lowest use classification specified in such
der, subject to the adjustments specified in paragraph (B) of this
bsection (5).

(E) Providing (i) except as to producers for whom such services
e being rendered by a cooperative marketing association, qualified
provided in paragraph (F) of this subsection (5), for market
formation to producers and for the verification of weights, sam-
ng, and testing of milk purchased from producers, and for making
propriate deductions therefore from payments to producers, and
) for assurance of, and security for, the payment by handlers for
lk purchased.

(F) Nothing contained in this subsection (5) is intended or shall
construed to prevent a cooperative marketing association qualified
der the provisions of the Act of Congress of February 18, 1922, as
ended, known as the "Capper-Volstead Act", engaged in making
llective sales or marketing of milk or its products for the producers
ereof, from blending the net proceeds of all its sales in all markets
all use classifications, and making distribution thereof to its pro-
cers in accordance with the contract between the association and
producers: *Provided*, That it shall not sell milk or its products to
y handler for use or consumption in any market at prices less than
e prices fixed pursuant to paragraph (A) of this subsection (5) for
ch milk.

(G) No marketing agreement or order applicable to milk and its
oducts in any marketing area shall prohibit or in any manner limit,
the case of the products of milk, the marketing in that area of any
lk or product thereof produced in any production area in the
ited States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not in-
ding apples and not including fruits, other than olives, for can-
g) and their products, tobacco and its products, vegetables (not
luding vegetables, other than asparagus, for canning) and their
oducts, soybeans and their products, and naval stores as included
the Naval Stores Act and standards established thereunder (in-
ding refined or partially refined oleoresin), orders issued pursuant
his section shall contain one or more of the following terms and
ditions, and (except as provided in subsection (7)) no others:
A) Limiting, or providing methods for the limitation of, the total
ntity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds at any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk and its products in the marketing area to which the contemplated mar-

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, making adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2) [10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provisions of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words

der such conditions and in sufficient quantities as to render or tend render ineffective or materially interfere with any program or eration undertaken, or to reduce substantially the amount of any oduct processed in the United States from any commodity subject and with respect to which any program is in operation, under this le, or the Soil Conservation and Domestic Allotment Act, as ended, he shall cause an immediate investigation to be made by the nited States Tariff Commission, which shall give precedence to vestigations under this section to determine such facts. Such in- stigation shall be made after due notice and opportunity for hearing interested parties and shall be conducted subject to such regulations the President shall specify.

(b) If, on the basis of such investigation and report to him of find- gs and recommendations made in connection therewith, the Presi- ent finds the existence of such facts, he shall by proclamation impose ch limitations on the total quantities of any article or articles hich may be imported as he finds and declares shown by such vestigation to be necessary to prescribe in order that the entry f such article or articles will not render or tend to render ineffec- ve or materially interfere with any program or operation under- aken, or will not reduce substantially the amount of any product rocessed in the United States from any commodity subject to and ith respect to which any program is in operation, under this title or he Soil Conservation and Domestic Allotment Act, as amended: rovided, That no limitation shall be imposed on the total quantity f any article which may be imported from any country which reduces uch permissible total quantity to less than 50 per centum of the aver- ge annual quantity of such article which was imported from such ountry during the period from July 1, 1928, to June 30, 1933, both ates inclusive.

(c) No import restriction proclaimed by the President under this ection nor any revocation, suspension, or modification thereof shall ecome effective until fifteen days after the date of such proclama- ion, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section hall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds hat the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President when- ever he finds that changed circumstances require such modification o carry out the purposes of this section.[15]

Sec. 2. The following provisions, reenacted in section 1 of this ct, are amended as follows: [16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or mployee of the Department of Agriculture as may be designated

[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of e Agricultural Adjustment Act, as amended, by inserting after the words "this title", herever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, s amended,"; and by deleting the words "an adjustment", wherever they appeared, and serting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement ct of 1937, are incorporated in the preceding text and in footnotes 2 to 9 inclusive and to 14 inclusive, supra.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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EXHIBIT B

United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE INC., ET AL.

John S. Yost, Charles J. McCarthy, Special Assistants to the Attorney General.

Harold R. Schilz, Special Assistant to the Attorney General.

E. O. Mather, Senior Attorney, Department of Agriculture.

Ralph L. Emmons, United States Attorney.

Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New York. Louis S. Wallach, Assistant Counsel.

Seward A. Miller, 11 West 42nd Street, New York, N. Y.; Edward Schoeneck, State Tower Building, Syracuse, N. Y.; Paul J. McCauley, 70 Pine Street, New York, N. Y.; Attorneys for Plaintiff, Dairymen's League Co-operative.

Edmund F. Cooke, Richard Cooke, Attorneys for Plaintiff, Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., Onondaga Hotel, Syracuse, N. Y., and Buffalo, N. Y.

Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Deposit, N. Y.; Haskell & Foley, Cortland, N. Y.; Attorneys for Defendants.

Samuel Rubinton, of Counsel for Rock Royal Co-Operative, Inc., 32 Court Street, Brooklyn, N. Y.

Leonard Acker, of Counsel for Central New York Co-operative, 32 Court Street, Brooklyn, N. Y.

COOPER, J.

This suit was brought by the Secretary of Agriculture in the name of the United States, for a mandatory injunction to compel the defendants to comply with the provisions of order No. 27 issued by the Secretary on August 5th, 1938, effective September 1, 1938.

The order was issued by the Secretary to make effective the provisions of the Agricultural Marketing Agreement act as amended in 1937.

The order is concerned only with milk produced by producers approved by the City of New York for sale in interstate commerce in the Metropolitan Milk Marketing Area, consisting of the counties in New York City and the Counties of Nassau, Suffolk, and Westchester.

Order 27, among other things provides for the payment, by non-cooperative dealers, called proprietary handlers, who buy milk from the producers, of a minimum price to the producers.

It also provides for the payment by all handlers, proprietary or cooperative, under varying conditions, of certain moneys into a milk pool or equalization fund, called Producers Settlement Fund, and also for withdrawals from that fund, chiefly by cooperatives.

This suit is brought to compel payment by the defendant into this Producers Settlement Fund of the following sums in compliance with the terms of order No. 27.

	September	October	November
Jetter Dairy Co	Paid	$14,616.05	$9,039.77
Rock Royal	$3,616.56	3,038.24	1,508.74
Schuyler Junction	1,603.00	1,337.40	757.64
Central New York	20,115.56	19,581.60	11,069.13

Similar amounts are claimed to be due for each succeeding month.

The State of New York has a statute called the Rogers-Allen Law similar to the Federal Act to cover milk produced by like approved producers for sale in intrastate commerce in the Metropolitan milk marketing area and under authority thereof the Commission of Agriculture, Farms and Markets of New York State issued his order No. 126.

The two orders are complementary and are administered by the same administrator appointed by each sovereignty.

The State Commissioner intervened as party plaintiff with the consent of the original plaintiff as did the Dairymen's League Co-operative Association, Inc., and also the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. But the latter two were allowed to intervene only to help the original plaintiff to defend against acts charged against them by the defendants relating to the referendum, and other things more fully referred to hereinafter.

Three of the four defendants are incorporated cooperative associations and the fourth, the Jetter Dairy Company is a proprietary handler.

It is not questioned here as the Court understands it, but that the milk of all four defendants reaches the Metropolitan marketing area through the channels of interstate commerce and that they are subject to Federal Order 27 if the Federal Statute and order 27 are valid and are not subject to State Order No. 126.

So the decision here is based on the Federal Order 27 and little attention will be given to State Order No. 126.

Order No. 27 is lengthy and somewhat complicated. That order is attached to and made a part of this memorandum. Parts of it will be referred to herein.

The Secretary contends that Order 27 was appropriate and necessary to effectuate the provisions of the Statute and asks that the defendants be compelled to comply with it by paying the aforesaid sums.

The defendants assert, on various grounds to be more particularly referred to later herein that the order is invalid, that its approval in the referendum of producers was procured by misrepresentation of its terms, that its terms, operation, and effect, and the statute under which it was issued, are so discriminatory that it will confiscate the defendants property, if enforced, and both statute and order are unconstitutional in operation and effect.

The statute involved in the present case under which the Secretary of Agriculture purported to

issue Marketing Order No. 27 is the Agricultural Marketing Agreement Act of 1937 (Act of June 3, 1937, Public No. 137, 75th Congress).

That act reenacts and amends some of the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by the Act of August 24, 1935 (49 Stat. 750).

The purpose of the act is set forth in the "declaration of policy" contained in section 2 of the Act. That purpose is to establish prices to farmers at a level which will give agricultural commodities a purchasing power, in relation to articles that farmers buy, equivalent to the purchasing power possessed by such commodities in the so-called "base period."

The attainment of the farmers purchasing power at such level is to be had by creating and maintaining orderly marketing conditions for agricultural commodities in interstate commerce through the exercise by the Secretary of Agriculture of the powers conferred by the Act.

The goal sought through the act is to regain for the farmers the favorable financial conditions which they enjoyed without any economic or marketing control during the base period which was about 25 years ago and before the world war.

The regulation of marketing conditions in agricultural commodities in interstate commerce through the machinery provided in the Act is merely a means of reaching and thereafter maintaining the goal sought. The act is in no sense an emergency measure but is to continue until the Secretary determines that the exercise of the powers therein conferred is no longer necessary or, possibly, is ineffective to obtain the desired object.

The means provided for attaining this object is the issuance of the Secretary of Agriculture of orders applicable to persons engaged in the handling in Interstate Commerce of certain agricultural commodities. Milk is one of the specified commodities (Section 8 (c) (2)).

Orders are to be issued when the Secretary has reason to believe that the issuance of the order will tend to effectuate the declared policy of the act with respect to the particular commodity involved when he so finds upon evidence introduced at a hearing of which he has given due notice (Section 8–C (3) (4)). Such an order may be issued with respect to the commodity if the handlers of not less than 50% of the volume of such commodity produced or marketed out of the particular area defined in the order, shall sign a marketing agreement which regulates the handling of the commodity in the manner provided in the order (Section 8–C (8)).

Should 50% of such handlers refuse to sign such an agreement an order may nevertheless be issued if the Secretary determines that their failure so to sign the marketing agreement tends to prevent effectuation of the declared policy of the act and that the issuance of the order is the only practical means of advancing the interests of the producers (Section 8 (c) (9)).

Whether an order is issued in connection with a marketing agreement under Section 8–C (8) or without such agreement under Section 8 (c) (9), the order must be approved by two-thirds of the producers of such commodity or the producers of two-thirds of the volume thereof, who during a representative period to be determined by the Secretary, were engaged in the production of such com-

modity for sale in the marketing area to which the order applied (Section 8–C (8 and 9)).

In order to determine that approval, the Secretary may conduct a referendum of producers, and if two-thirds of those represented in the referendum approve, that is sufficient. (Section 8 (c) 19.)

In conducting such referendum the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide, engaged in marketing the commodity or product thereof, covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such cooperative association of producers 8 (c) (12).

A number of terms and conditions are set forth in the act, one or more of which must be contained in all orders.

These terms and conditions include provisions prohibiting unfair methods of competition and unfair trade practices and, except in the case of fluid milk or cream to be sold for consumption in fluid form, provision for sale of commodities only to be at prices fixed by the handlers and also a provision for the selection of the agency to administer the order.

Besides these general terms common to all orders, the Statute states particular terms or conditions to be included in orders relating to milk and its products. Section 8 (c) 5.

None of these terms and conditions need be included in the order but the order must contain at least one of them.

The first term provides for classifying milk in accordance with the form or the purpose for which it is used, fixing a minimum price for each such used classification, which all handlers shall pay for milk purchased from producers or associations of producers, and a time when payment shall be made (Section 8 (c) (5) (a)). The prices so fixed are to be uniform for each classification of milk, subject, however, to certain differentials. The classification of milk is to be determined not by the character of the milk sold by the farmer or the handler, but by the form in which or the purpose for which the handler uses it. The farmers all sell milk in fluid form, varying no doubt as to the grade and quality but still fluid milk. The handler may resell or use such milk in different forms for different purposes. Some he may sell as fluid milk, some he may convert into butter or cream, and some he may manufacture into ice cream or other manufactured milk products. Its subsequent use determines the class into which falls the milk he buys from the farmer and the price he has to pay.

The second term or condition is designed to secure for each farmer a uniform price for all the milk he sells regardless of the classification in which it falls. Section 8c (5) b.

This equalization provision may take one of two forms. It may provide for the payment of uniform prices, either (1) to all producers selling to the same handler, or (2) to all producers selling to all handlers, irrespective of the uses made of the milk by the particular handler to whom it is delivered. In either case the uniform prices are subject to certain adjustments for market differ-

entials, grade and quality of the milk, and point of delivery of the milk. These two alternative provisions may be designated as "dealer equalization" and "market equalization." The first alternative, that of "dealer equalization," secures to the producers selling to one dealer a uniform price for the milk they deliver to him. If different rates have been fixed for different classifications of milk, the dealer may not attribute all the milk of one class he buys to a particular farmer or group of farmers, and all the milk of another class to other farmers. He must allocate among all his farmers equally all classifications of milk he purchases. The second alternative, that of "market equalization," secures to all farmers in the market covered by the order a uniform price for all milk delivered. It is immaterial that the particular handler to whom a farmer sells, buys milk of only one classification. Each farmer in the market is to be paid a price based on his pro rata share of all classifications of milk purchased by all dealers in the production area. The principle of allocation is extended from allocation among all producers of each dealer to allocation among all producers selling to all dealers. In both cases, however, the uniform prices may be subject to certain adjustments.

It will be seen that the first term providing for payment by the handler on the basis of the use to which he puts the milk purchased, and the second term, providing for receipt by the farmer of a uniform price regardless of the use to which the particular milk he sells is put, appear to be inconsistent and to leave open a gap between the amount the handler must pay and the amount the farmer

is to receive. This gap will not appear if the provision for uniform receipts by farmers is that of "dealer equalization." The handler will pay to all his farmers as a group a total amount based on his total purchases of milk of all classifications. That total amount will be allocated among all his farmers. But if the provision for uniform receipts is that of "market equalization" the gap is clear. The handler is to pay only on the basis of his own use and the farmer is to receive on the basis of the use of the entire market. The handler may, therefore, have to pay more or less than his farmers are to receive.

This gap is bridged by the third term that may be included in a milk order (Section 8c (5) (C)), providing a method for making adjustments in payments as among handlers, to the end that the total sums paid by each handler shall equal the "value" of the milk purchased by him at the rates fixed in accordance with the first term. By virtue of this provision in any order, handlers, who, on the basis of their own use, should pay more than the amount their farmers are entitled to receive, may be required to pay the excess to other handlers who, on the basis of their own use, should pay less than their farmers are entitled to receive. The first term, therefore, fixes the "value" that the handler "owes" for his milk. That "value" may be greater or less than the "price" he has to pay his farmers, fixed in accordance with the second term. If greater, he pays the excess to other handlers. If less, he pays the required "price" to his farmers and collects the difference from other handlers whose "value" was greater than the "price."

The fourth term (Section 8c (5) (D)) provides hat producers who were not regularly selling milk luring a thirty-day period prior to the effective late of the order shall be paid at the rate for the owest use classification for a period of two cal-ndar months.

The fifth term (Section 8 (c) (5) (E)) is a pro-ision for rendering market information and for rification of weights, sampling, and testing of nilk sold by producers, for whom such services are ot rendered by a cooperative marketing associa-ion qualified under the "Capper-Volstead Act." Appropriate deductions to cover these services are o be made from payments to producers.

The sixth term (Section 8 (c) (5) (F)) provides hat cooperative marketing associations, qualified nder the "Capper-Volstead Act may blend the pro-eeds of all sales in all markets in all use classifica-ions and distribute to producers in accordance vith the contract between the association and its roducers, thus in effect exempting such associa-ions from the "market equalization" provisions hich may be imposed upon competing handlers. he last term (Section 8 (c) (5) (G)) provides hat no milk order shall prohibit or limit the mar-eting in the area covered by the order of milk roduced in any production area in the United tates.

Orders, once effective, may be terminated or sus-ended by the Secretary, whenever he finds that the der obstructs or does not tend to effectuate the de-ared purposes of the Act (Section 8 (c) (16) (A)), d must be terminated when termination is fa-ored by a majority of producers engaged in pro-

duction of the commodity for sale in the marketing area during a representative period, provided such majority have produced more than 50 percent of the volume of the commodity (Section 8 (c) (16) (B)).

Violation of an order renders the handler subject to a fine (Section 8 (c) (14)). Jurisdiction is vested in the district courts to enforce, and to restrain violation of, any order, regulation, or agreement made pursuant to the Act (Section 8 (a) (6)).

A handler subject to an order may seek administrative relief by petition to the Secretary stating that an order or obligation imposed thereby is not in accordance with law and praying that it be modified or he be exempted from it. (Section 8 (c) (15) (A)). The ruling of the Secretary, after hearing on the petition, is subject to review in equity in the District Courts. Any proceeding brought under (Section 8 (a) (15)) to enforce the provisions of an order abate whenever a final decree is entered in proceedings to review the ruling of the Secretary on the petition (Section 8 (c) (15) (B)).

Order No. 27 in Article III classified milk in 9 classifications, viz Classes I, II–A, II–B, III–A, III–B, III–C, III–D, IV–A, and IV–B.

Class I may be called fluid milk.

Class II–A is cream with certain exceptions.

The remaining classes relate to various products made from fluid milk.

Article IV fixes the minimum prices for milk in the various classes with variations for certain months.

Articles V relates to reports of handlers.

Article VI relates to the determination of uniform prices by formulas therein contained.

Article 7 relates to payment to producers.

Article 7, Section 1, exempts cooperatives from paying the uniform price to their producers.

Article VII, Section 6 provides for certain service payments to all handlers who come within the provisions thereof.

Article VII, Section 7, provides for payment to the Producers Settlement Fund.

Article VII, Section 8, provides for payments out of the Producers Settlement Fund.

All of the defendants are handlers as defined in the order. None of them have facilities for the manufacture of milk products and none of them are engaged in marketing milk outside the marketing area.

The order established prices to be paid for milk according to its utilization. The price of milk for fluid consumption known as Class I is fixed arbitrarily, depending upon the market price of butter. The price of Class II–A milk (cream for fluid consumption) is likewise fixed arbitrarily. The price for fluid milk has been $2.45 per cwt. since September 1, 1938.

Prices for milk manufactured into various milk products, are the assumed values thereof, based on market prices of the products into which the milk is manufactured which products are sold in country-wide competition. The prices for milk used in the manufacture of milk products is determined monthly by the Administrator by the use of formulae therefor contained in the order.

All handlers purchasing milk from producers are required to report to the Administrator monthly, a statement of the amounts of milk purchased by

such handler, and the utilization thereof (Article V, Section 2).

Based on the reports of all handlers, the Administrator computes the total value of the milk of such handler, based on the prices provided in the order (Article VI, Section 7). The result of such computation is the "net pool obligation."

Upon these same reports, the Administrator computes a "uniform" price which is the average price payable to producers for milk for each month, subject to certain differentials in part referred to hereinafter (Article VI, Section 2). Such involves also subtracting certain special payments to handlers under Article VI, Sections 5 and 6.

Each handler, which is not a cooperative association of producers on or before the 25th of each month, is required to pay to each producer the "uniform price" for all milk delivered by producers during the preceding month and which was sold in the marketing area (Article VII, Section 1).

Cooperative associations which are handlers are not required to make payment for such milk delivered to them by producers at the "uniform price" or at any fixed or stated price.

All handlers are required to pay into the Producers Settlement Fund on or before the 18th day of each month the difference between $2.45 per cwt. and the uniform price for all Class I milk (fluid milk) Article VII, Section 8.

Handlers selling milk outside the marketing area are under no requirement to pay the producers the uniform price for such milk nor to pay into the Producers Settlement Fund the difference between the uniform price and the actual market

value of such milk. Such handlers are permitted to "blend" prices paid or purported to have been paid for such milk sold in the outside market, with the uniform price announced by the Administrator for milk sold in the marketing area, thereby reducing the actual price paid to producers by such handlers for milk sold by them in the marketing area in competition with the defendant and others in like situation whose milk is sold entirely in the marketing area. This permits handlers selling in the outside market by blending milk so sold with milk sold in the marketing area to pay the producers at less than the order price and less than the actual value, if the price figured by the handlers for sales in outside markets (called "unpriced milk") is lower than the actual market value.

Cooperatives are not only exempted from paying the uniform price or any fixed portion thereof to producers but are permitted to blend prices of milk received in the production area and sold in the outside marketing area.

Other discriminations in favor of cooperatives and large dealers are briefly referred to hereinafter.

The laudable purpose of the statute to procure for farmers prices for their milk commensurate with their purchasing power at specified periods of better balance of purchasing power is not criticized or condemned. Nor is there any denial that the production or sale of milk presents peculiar problems due in part to excess supply at certain times and almost scarcity at others.

The challenge is to the means set up in the statute and order for dealing with the conditions. These means constitute, defendants claim, such gross discrimination as to drive defendants out of business and confiscate their property by the arbitrary discrimination therein provided and without any lack of efficiency on the part of the defendants.

The defendants contend that the order was put forward by the Metropolitan Co-Operative Milk Bargaining Agency in connection with the Dairymen's League, that it was designed for and has the effect of, in connection with the destructive marketing conditions in the Metropolitan area, driving out of business competitors not enjoying special price and other favorable arrangements with cooperatives; that the vote in the referendum of producers was brought about by misrepresentation as to the terms and effect of the order both on the part of agents of the Secretary of Agriculture and the State Commissioner, as well as by the Bargaining Agency and the Dairymen's League; that the referendum was thereby unfair and that the Dairymen's League alone cast two-thirds of the favorable votes cast.

Consideration will be given first to the legislation and the activities of the Bargaining Agency and the Dairymen's League in connection with the legislation and the preparation, promulgating and adoption of the order and the Referendum preceding its issuance by the Secretary.

The Rogers-Allen law was enacted first in 1937 by the Legislature of the State of New York as Chapter 383 of the Laws of 1937. Its provisions, so far as they relate to milk are similar to the

provisions of the Agricultural Marketing agreement as amended in 1937.

The amendments to the Federal Agricultural Marketing Agreement Act became effective on June 3, 1937. One of the amendments was the insertion in the act of Section 8 (c) 19, providing for a Producers' Referendum to determine whether or not an order is approved by two-thirds of the producers.

The intervening plaintiff, the Dairymen's League, in cooperation with the New York State Conference Board of Farm Organizations of which it is the sole member representing milk producers, actively sponsored and supported the enactment of the Rogers-Allen Law.

After the enactment of the Rogers-Allen Law and almost immediately after the amendment of the Agricultural Marketing Agreement Act, viz, on or about the 7th of June 1937, the Dairymen's League in conjunction with representatives of other cooperative organizations of the State, organized and incorporated the Metropolitan Co-Operative Milk Producers Bargaining Agency, Inc., under the Cooperative Corporations Law of the State of New York. This Metropolitan Bargaining Agency consisted entirely of cooperative associations. Among its directors were several representatives of the Dairymen's League and Sheffield Producers Cooperative Assn., Inc., another large cooperative. While these two cooperatives never had a majority of the Board of Directors of the Bargaining Agency, it is clear that they exercised an important if not the dominating influence over the activities of the Bargaining Agency.

After the Incorporation of the Bargaining Agency in 1937, it set about inducing producers selling milk to proprietary handlers to form cooperatives for the purpose of joining the bargaining agency.

Many were so formed, including all three cooperatives of the producers delivering milk to the Defendant, Jettef Dairy Company, though only one joined the Bargaining Agency. In some instances the Bargaining Agency advanced the fee for filing certificates of incorporation.

By June of 1938 there were 193 cooperative associations, most of which were members of the bargaining agency. The membership of these cooperatives included a very large percentage of all the producers. Many of these producers delivered milk to proprietary handlers and many to cooperative handlers.

In July 1937, Mr. E. Harmon, then connected with the Dairy Section of the Federal Department of Agriculture and later Federal and State Administrator of orders 27 and 126, addressed a meeting of the Bargaining Agency relative to Federal Aid in a marketing program and spent three days monthly commencing with November 1937, at least some portion of which was spent in conference with the representatives of the bargaining agency and others about the marketing program.

About November 1st, 1937, the Bargaining Agency appointed a lawyer's committee to draft a form of marketing agreement in order to regulate the sale of milk in New York City.

The original draft of such agreement and order was presented to the committee by Mr. Allen D.

Miller, one of the attorneys for the Dairymen's League.

Early in 1938, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture and Markets of the State of New York, respectively, petitions for the issuance of Federal and State orders under the Agricultural and Marketing Agreement Act as amended in 1937 and of the State Rogers-Allen Law, and presented therewith proposed marketing agreement and proposed order regulating the handling of milk in the New York Metropolitan marketing area.

On April 29, 1938, the Secretary of Agriculture and the State Commissioner of Agriculture gave notice of hearings to be held on the proposed order and marketing agreement commencing May 16, 1938 at Albany and continuing at Malone on May 19th, Syracuse on May 18th, Elmira on May 19th, New York City on May 20th, 24th, 25th and 26th, and again at Albany June 3rd, 4th and 7th. Hearings were held at these places on these dates. The State Commissioner of Agriculture gave notice of like hearings on the like proposed state order. The hearings were conducted jointly by the Secretary of Agriculture and the State Commissioner of Agriculture through jointly appointed representatives.

Commencing in April 1938, radio addresses were made by representatives of the Bargaining Agency urging the adoption of the agreement and order. The Dairymen's League News and the Bargaining Agency publications, which were widely distributed among the milk-producing farmers, urged the adoption of the proposed agreement and order.

The Secretary of Agriculture caused to be printed and sent out to producers and others the proposed order and agreement and also certain pamphlets.

The pamphlets purported to explain the meaning and intent of the agreement and order, the latter of which is complicated and not easily intelligible to the man of ordinary education.

The pamphlet "Explanation of the Federal State Marketing Plan" explaining Order 27 states:

> The hearings on the marketing agreement program were called at the request of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., which claims a membership of cooperative associations representing over 40,000 producers.

Under the heading "Principal Provisions" appears this:

> 3. The establishment of minimum prices which handlers are required to pay producers of each class of milk.

Under "Producers to decide" appears this:

> The definition (handlers) specifically includes any cooperative association that operates plants or any cooperative association which causes milk to be delivered to plants of handlers and collects payment for such milk.

These Provisions would undoubtedly lead the farmer-producer who received the pamphlet to believe that the uniform price would be paid to all producers by all handlers, proprietary or cooperative.

True, at a later point the pamphlet also says under:

UNIFORM POOL PRICES FOR PRODUCERS

> The order requires handlers to pay a uniform pool or blended price, calculated by the market administrator, to all producers delivering milk in any month unless the handler has received milk and sold it as Class I milk outside the marketing area. In such an instance the handler is required to pay the uniform price to each producer on that part of the milk received which is equal to the proportion of his milk to which minimum prices are applicable. (It does not say, on that portion of the milk sold in the marketing area.) For the remainder of each producer's milk the handler may pay such prices as he sees fit * * *.

But this is so involved and technical and appears on the last page of the pamphlet and would hardly be likely to lead the farmer to doubt that all producers would receive the minimum uniform price fixed by the administration.

On or about August 5th, 1938, the Secretary of Agriculture tentatively approved the proposed order and a marketing agreement and sent it out to all handlers who would be subject to the provisions of the order, but the requisite 50% of the handlers failed to sign the marketing agreement.

The failure of 50% of the handlers to sign the marketing agreement required the approval of the order by two-thirds of the producers.

In August 1938 there were 54,111 producers whose dairies had been approved for Grade B Milk and 6,109 for Grade A Milk, or a total of 60,220 producers. They were located in New York, Pennsylvania, New Jersey, Massachusetts, Connecticut, and Vermont.

About 420 Country milk receiving stations for Grade B Milk and 86 for Grade A Milk or a total of 506 had been approved within this territory.

Of these the Dairymen's League operated 109 stations receiving milk from 11,391 producers. In addition thereto Bordens operated 65 approved milk receiving stations receiving milk from 8,404 producers, all of which producers are members of the Dairymen's League. Bordens pays the Dairymen's League for milk received at these plants and the League pays the producers. The total number of producers included in the Dairymen's League Membership is upwards of 19,500. Dairymen's League does 34% of the milk business in the Metropolitan area.

Sheffield Farms Inc. and Sheffield Farms Condensed Milk Company operate 87 approved milk receiving stations receiving milk from 10,334 producers. The greater part of these producers deliver milk to Sheffield Farms Inc. and are organized as a cooperative association known as Sheffield Producers Co-operative Association.

The Department of Agriculture of the United States in August 1938 issued a printed pamphlet under the Seal of the Department. In that pamphlet appears this:

> The Order (27) requires handlers to pay the uniform pool or blanket price, calculated by the market Administrator, to *all* producers delivering milk during any month unless the handler has received milk and sold it as Class I Milk outside the marketing area * * *.
>
> Operation of the pool assures all handlers the same cost for milk sold in the marketing area, and for that milk assures payments to

> *all producers at uniform rate* except for the transportation and other differentials.

The last above paragraph quoted from the Government pamphlet is identical, word for word, with a paragraph contained in the Dairymen's League News of August 16, 1938, on Page 5.

These statements were incorrect. There is nothing in the order requiring payment of a uniform price to *all* producers or that the uniform price or any stated price or any price determinable under the order be paid to producers of the cooperative associations even for milk sold in the marketing area.

About this time a pamphlet issued by the Bargaining Agency was entitled "Mr. Dairyman—Save This Booklet." "The Plan," it explains, "may save your farm." On Page 1, under the heading "Principles Upon Which the Order Is Based," appears this:

> The fundamental requirements of the industry which the order seeks to establish are five in number, viz:
>
> "1. An *equal* purchase price to be paid by *all* dealers for milk for the same use.
>
> "2. An *equal* share to each producer of the benefits of the fluid market."

These are not accurate statements, for the Dairymen's League and other cooperatives are not required to pay a price equal to that paid by proprietary dealers.

Had this order been prepared by and for the Dairymen's League and other large cooperatives, it could hardly have been more favorable to them.

The Dairymen's League and Metropolitan Bargaining Agency publications were sent broadcast

to producers urging them to vote for the order and assuring that they would receive a higher price than they had before received, and radio addresses to like effect were made.

Following this and on August 19, 1938, and for several days thereafter, the Secretary conducted a referendum. The State Commissioner of Agriculture conducted a referendum on State Order 126 at the same times and places.

The referendum was held at the times and places set forth in a schedule of polling places issued by the Secretary prior to the referendum; 308 polling places were designated, of which 233 were in New York, 35 in Pennsylvania, and 16 in New Jersey.

Prior to the referendum there was sent to each known eligible producer a copy of the proposed order as issued by him on August 5th, the schedule of polling places and a pamphlet prepared by him entitled "Questions and Answers on the Federal and State Milk Program for New York," and another pamphlet also prepared by him entitled "New York Milk, Explanation of Federal State Marketing Plan, contained in Order 27."

About 70,000 copies of these documents were sent through Federal and State Agencies to such producers.

The Metropolitan Bargaining Agency, whose largest and most influential member was the Dairymen's League, spent $108,637.91 to promote the adoption of this order covering salaries, publicity, printing, radio, etc., of which $12,385.00 was for radio addresses, $7,979.00, which $12,385.00 was spent during the period between June 1 and September 1, during which time took place the last of the hearings and all the efforts to obtain signa-

tures to the agreement by 50% of the handlers and to procure two-thirds of the producers to vote favorably on the Referendum.

Prior to the referendum a list of cooperative associations entitled to vote for their members was compiled. There were about 22 cooperatives found entitled to vote for their members. A letter was sent to each declaring the requirements for voting for their members. The 22 cooperatives cast 24,903 votes, of which 24,580 were in favor of the order and 323 were against it.

On the referendum held August 19th for several days, 45,664 votes were cast out of a total of 60,220 producers qualified to vote, but 7,017 of the 45,664 were rejected as invalid, leaving 38,627 valid votes. Of these 38,627, 33,663 votes or 87.1% were in favor of the issuance of the order. Of this 33,663 favorable votes, 22,297 or slightly more than two-thirds were cast by the Dairymen's League, Inc., alone as a corporation for its members and other producers delivering milk to it. It had only about 19,500 members.

Of the 7,017 votes rejected as invalid, 5,110 votes were in favor and 1,437 against the order, making a total of 6,547. These were rejected because either the voters were members of cooperatives which had voted for their members or because they were not qualified to vote. 470 voters of 7,017 rejected failed to mark their ballots for or against the order.

Had it not been for these misrepresentations the order might not have had the approval of two-thirds of 38,627 votes counted as valid. 12,876 negative votes would have defeated the order.

No one knows how these producers not voted by the cooperative associations would have voted had they but been correctly informed of the terms and effect of the order, nor how many of the 14,576 voters who did not vote at all nor the 7,017 whose votes were declared invalid would have voted had there been no misrepresentation of the terms and effect of the order.

The statute (Section 8 (c) (12)) is mandatory that the—

> Secretary shall consider the approval or disapproval by any cooperative association * * * as the approval or disapproval of the producers who are members of, stockholders in, or under contract with such cooperative association of producers.

That this applies to approval upon a referendum is made clear by Section 8 (c) (19).

So great was the power and voting strength of the Dairymen's League that no order which it opposed could be approved, for it controlled more than one-third of the entire number of producers entitled to vote.

This, urge the defendants, may explain why the order contains so many provisions claimed to be discriminatory in favor of large cooperatives and against proprietary handlers and small cooperatives.

Nor is it affected by the fact that some of the provisions in the order were the same as in previous but generally futile attempts by state action to beneficially regulate the milk industry.

This is not to be taken as suggesting that the Dairymen's League would not approve an order that was beneficial to the milk industry, but it

must be an order which the Dairymen's League believes will be beneficial.

The Secretary has no right to exclude from voting any cooperative "engaged in marketing the commodity or product thereof, or in advancing the interests of the producers of such commodity." Section 8 (c) (12). Yet the Secretary found only 22 of 193 cooperatives who were entitled to and desired to vote for its members.

The defendant, Schuyler Junction, N. Y., Milk Shed Co-operative made no application to the Secretary for qualification to vote for its members and did not apply for a cooperative ballot and when it attempted through its President to vote in the Referendum for its members the President was told that he could not do so. Upon his insistence that his ballot be taken, it was taken, but the President was told that it would not be counted. This was probably error. The statute fixes the qualifications for cooperatives and no application is necessary. The burden seems to be on the Secretary to ascertain whether a cooperative meets the requirements of the statute and he may not make any additional qualifications such as applying for the right to vote or for a ballot.

The statute says the Secretary "shall" regard the approval or disapproval of a cooperative which complies with the statutory requirements. There seems no reason to doubt that Schuyler Junction Co-operative was entitled to vote and its vote should have been received and counted.

It seems that letters under date of July 8, 1938 (Exhibit 14 to Stip.), purporting to be authorized and directed by the Federal Secretary and State Commissioner of Agriculture, were sent to these

193 cooperatives or so many of them as were then known to exist. The letters said:

> It is expected that simultaneous referenda will be conducted by the Secretary and Commissioner to ascertain if and when such order is perfected for the New York Market.

Certain information and requirements were sought from and presented to these cooperatives, at least some of which was not necessary to determine their right to vote.

In any event they were required to furnish the required information, determine their intention to vote for their members and have such information in the hands of the representatives of the Secretary at Washington and the Commissioner at Albany not later than July 16, 1938. The cooperatives were in the same letter notified:

> In the event the requested information is not submitted, or the Secretary determines that such association is not qualified, the member-producer will be given an opportunity to vote individually and any vote submitted by such cooperative will be disregarded.

Here we have the cooperatives required to give information and determine within eight days, less time out for transportation of mail from Washington and to country districts and back to Washington, whether they favored an order not yet definitely known and whether they wished to vote as a cooperative for or against such order.

Assume four days for transportation (two days each way) that leaves four days for the collection of the information, calling meetings of directors and determination whether the cooperative would

vote for its members on an unknown order and in a Referendum not yet called and not held within a month thereafter. It is not surprising that only 54 out of the 193 cooperatives replied within this limited time and that only 22 had time to determine and so inform the Secretary and the Commissioner that they would vote for their members.

It is reasonably clear that the producers were led to believe that equal uniform prices for all producers would be received under order No. 27.

We hav then a favorable vote obtained or influenced by misinformation as to the terms and effects of the order.

We have also the Dairymen's League alone casting in favor of the order two-thirds of all the votes cast in favor of the order.

Should the conscience of the Court be satisfied that the order should be enforeed when it was adopted on such a referendum and under the circumstances here shown? Manifestly not unless the Secretary's finding is binding on the Court despite the fact that some of the misinformation was contained in departmental literature sent to producer voters.

It is said that the Secretary cannot be held responsible for the acts of the Bargaining Agency and the Dairymen's League. There can be little doubt of the cooperation between Federal and State Agents with the cooperatives to bring about a favorable vote for the order in the Referendum. Of this, the Secretary himself was probably unaware and relied on his subordinates. Indicative of cooperation is the misleading statement in the Department's published statement of August 1938,

taken verbatim from the Dairymen's League News of August 16, 1938.

After the order became effective on Sept. 1, 1938, strenuous efforts were apparently made to persuade or coerce proprietary handlers to sign the marketing agreement, every handler signing the agreement estopped himself from any legal attack on the order after signing and for a period of 31 to 59 days after he should withdraw from the marketing agreement.

Specific instances of diversion of withholding of milk from dealers until they signed the marketing agreement appear in the record and some of them were the result of official pressure, but not directly by the market administrator.

Effort was made to persuade at least one producer to withhold milk from the defendant Jetter Dairy Company. Publications by the Bargaining Agency and the Dairymen's League, letters by officers thereof, frankly suggest pressure, if not more, to persuade the handlers to sign the marketing agreement.

In the Dairymen's League News of Sept. 26, 1938, on the front page appeared an article headed:

PRODUCERS READY TO DIVERT MILK FROM NON-COMPLYING DEALERS

League gets thanks from Bargaining Agency for its offer of marketing facilities.

VOLUNTEER ENFORCEMENT AGENTS—100 STRONG WORKING THE ROADS LAST WEEK

This action followed a meeting of delegates of the Metropolitan Co-operative Milk Producers Bargaining Agency in Syracuse Sept. 10th. The delegates voted to have 100

farmers go out as volunteer enforcement agents to "crack down" on delegates who have not signed the marketing agreement.

* * * The Dairymen's League Plants are open * * * and others too, said Mr. ——— (A State official). Call me up. I'll tell you where to put your milk. You won't have to divert very long before these dealers will be ready to sign up.

In the Bargaining Agency's "Milk Producers Market News" for October 1938 appeared this:

Please bear in mind that our able Secretary who is in charge of the "Minute Men" is doing a fine job and these men are on the watch at all times for disturbances, chiseling, and other items that are not for the best interests of your producers.

Other statements of suggested coercion and force are frequent.

On September 21, 1938, an officer of the Bargaining Agency issued a letter which was circulated among the producers, including those of the Jetter Dairy Company.

Among other things the letter said:

* * * almost every dealer in the Metropolitan Market has signed the agreement. In some instances it has been necessary to exert producer pressure and the willingness of producer to cooperate in withholding or offering to withhold their milk until their dealer signed, has been encouraging and gratifying.

From Sept. 1, 1938, to December 1, 1938, the Bargaining Agency has spent $31,348.98.

It is not an unreasonable inference under the evidence of persuasion, pressure, and coercion, that no small part was spent in obtaining the signatures by handlers to the marketing agreement to prevent litigation which the agency asserted had impaired the effectiveness of the order in the Boston Marketing area.

The record shows clear evidence that the Dairymen's League and the Bargaining Agency, aided by some officials not Federal, brought about the signing of the marketing agreement by nearly all the handlers.

Efforts were made to persuade the producers of the cooperatives delivering to the defendant Jetter Dairy Company and others who had not signed the marketing agreement to transfer their milk to other handlers, by representations that the producers delivering to Jetter and others might not be paid for their milk.

It is urged that these post-referendum happenings are not relevant either as to the referendum or as to the terms, conditions, or validity of the order or of the statute. The question is not free from doubt. But they seem to this Court to fit into and illustrate the design to prepare, present, and secure the approval of this order, first by the public authorities and then by the producers in the referendum on this order, apparently so greatly desired by the Dairymen's League, the Bargaining Agency and the large cooperatives and large handlers, and also to aid in understanding the operation and effect of the order.

Without doubt, the Secretary of Agriculture hoped and believed order No. 27 and its comple-

mentary State order No. 126 would remedy the chaotic milk situation in the Metropolitan Area, which had been a vexatious and seemingly unending problem to legislative bodies and executive authority. Undoubtedly the State Commissioner of Agriculture had like hope and belief.

It may be assumed that the Bargaining Agency and Dairymen's League Cooperatives believe that these orders would solve the milk problem when they prepared and put forward their proposed order or orders. The results, however, have not justified such expectations.

The results of the operation of the order would not ordinarily be a matter of judicial concern, but if such results have the effect of taking the property of one set of handlers without compensation and giving such property to another set of handlers, amounting to what the defendants call confiscation, it bears upon the validity and constitutionality of the order and the statute.

It is agreed here that handlers must receive not less than 9¾ cents per quart for milk in glass bottles sold to stores and other retail dealers in order to pay for full butter-fat content and all other charges and make full payment under the order to producers.

This price is based upon efficient operation and makes no allowance for inefficiency.

About September 1st, the price to retail distributors was advanced to 9¾ cents per quart. Within two weeks cut throat competition under the order reduced this price to a level of from 8 to 9 cents per quart and milk was being sold generally at that price to dealers and store trade in the metropolitan

area. This is about the same price that prevailed before the order became effective.

Some time prior to September 1st, 1938, the Jetter Dairy Company had been selling to one Weintraub thirty cases of milk daily and the price of the milk on that date was 9¾ cents per quart. On September 4th, 1938, the Dairymen's League solicited said account and by selling milk at 9 cents per quart acquired 10 cases of said trade. Gold Medal Farms Inc. by the same price cutting on the same date also acquired 10 cases of the trade of the said Weintraub. In order to retain the balance of 10 cases of such trade the defendant Jetter Dairy Company was compelled to reduce its price to 9 cents per quart on September 5th, 1938.

The Sheffield Farms Company offered one Herman Lavender milk at 9¾ cents per quart on all milk purchased and in addition thereto delivered 13 quarts per case instead of 12 quarts, the extra quart of milk further reducing the price ¾th cents per quart, making a net cost to Lavender of 8¼ cents per quart.

The Sheffield Company, a subsidiary of National Dairy Products Corporation, also sold milk to one Rose Paley. This Company gave her 35 cases of free milk to induce her to buy Breakstone milk, the latter being also a subsidiary of National Dairy, and its milk being sold by the Sheffield Company.

The Dairymen's League also gave the same Rose Paley 35 cases of free milk to procure her using the Dairymen's League Milk.

The Sheffield Company delivered milk to Mrs. Paley at 9¾ cents per quart and collected that

amount and rebated to her in cash at the rate of ¾ cent per quart. The Dairymen's League billed milk to her at nine cents per quart.

The Grant View Dairy Company, which had been selling Mrs. Paley milk refused to give her any free milk and she discontinued buying from it and obtained all her milk from Sheffield's and the Dairymen's League, who made the aforesaid concessions.

The practices above referred to were general throughout the marketing area and therefore the price of milk to grocers and other retail distributors was lowered to a price varying from 8 to 9 cents per quart. Producers who sell directly to the grocers and retail distributors are not subject to the order, selling their own milk and do not have to pay the producers a uniform price nor do they have to pay into any producers settlement fund.

One of these, the Balsam Dairy Company, a producer dealer, owning a large number of cows and free from the order, selling milk in Brooklyn, sold milk to Israel Hoch in September and October in Brooklyn at 8½ cents per quart and presumably since.

From September 1st, 1938, to January 1, 1939, the defendant Jetter Dairy Company lost 240 cases of daily sales of milk to competitors by reason of these concessions. The Jetter Dairy Company handles a minimum of 40,000 quarts per day. The result—a loss of 1 cent to 1½ cents per quart has been from $400.00 to $600.00 per day.

The average quantities of fluid milk sold by the Dairymen's League, including milk distributed directly by the Dairymen's League and milk sold by the Dairymen's League to Distributors during the months of September, October, and November 1938, was approximately 26,000 forty-quart cans or a total of 1,640,000 quarts daily, constituting about 34% of the fluid milk in the marketing area.

If the Dairymen's League had to pay the same uniform price to producers as does the Jetter Dairy Company and other independent proprietary handlers, on the same basis of sale at 1 to 1½ cents below the cost price of 9¾ cents per quart, the Dairymen's League would lose from $10,400.00 to $15,600.00 per day. But the Dairymen's League does not pay the uniform price to these producers, and is not required by the statute or the order to do so. It may deduct such losses from its price paid to producers. Besides that, it may recoup itself in other ways by service charges and milk sales out of the district.

The amount paid to producers by the Dairymen's League for Class I Milk, at the base for 3.5% butterfat content in the 200-mile zone in cash and certificates of indebtedness to be taken as cash are as follows:

September 1.75%.
October 1.81%.
November 2.01%.

While the uniform price fixed by the administration on the same basis of 3.5% milk for the 200-mile zone was as follows:

September 1.87%.
October 1.91%.
November 2.10%.

It will be seen that the uniform price which the proprietary handlers paid to the producer was greater than that paid by the Dairymen's League to the producers as follows: September 12 cents, October 10 cents, November 9 cents per cwt.

Another source of great discrimination in favor of the large milk operators who can sell in the outside market is contained in the provision that the handler may blend the price of milk sold in the outside market with the milk in the Metropolitan area.

The Dairymen's League sold large quantities of milk, called unpriced milk in New Jersey, averaging more than 10,000,000 pounds per month.

The producers' price of milk in New Jersey is fixed by the State Board at $2.76 per cwt. It is not established in the evidence that the Dairymen's League received that price for its milk produced in the New York Production area and sold in New Jersey.

While the Dairymen's League offered the defendants almost all the things they desired about their prices and quantities, etc., the prices at which the Dairymen's League sold in New Jersey was not disclosed and the Court did not require its disclosure.

The New Jersey State Board fixes the resale price of milk sold to stores at 12 cents per quart, in rural districts and 13 cents per quart in the three heavily populated districts.

This compares with prices of 8 to 9 cents per quart received for such milk wholesale in the Metropolitan area.

It is a reasonable inference that its milk was sold at about the fixed price in New Jersey or at

very little less than that price, if such price was not obtainable.

The records of the Dairymen's League show that they sold about 20% of their entire sales in New Jersey.

If they sold at the base price of $2.76 per cwt. in New Jersey, the difference between the amount which the Dairymen's League received from this New Jersey Milk and the price it paid to the producers for September is $1.01 per cwt. ($2.76—$1.75). For October the difference was 95¢ per cwt. ($2.76—$1.81). For November the price was 75¢ per cwt. ($2.76—$2.01).

The price which the Dairymen's League paid to its producers for this large quantity of milk (10,208,500 lbs.), amounted for the September milk to $178,648.00. This is on the basis of about $1.75 per cwt. Assuming a sale price of $2.76 per cwt., this leaves about $103,195.00 profit on this milk sold in New Jersey in September from which must be deducted transportation charges and certain other expenses but which could not be measurably greater than on milk sold in the marketing area.

This sale was in the fixed price market in New Jersey whereas the sales in the Metropolitan area were in the competitive market with no prices fixed and where the milk sold at from 1 to 1½ cents per quart less than it cost for production and delivery.

Strenuous objection was made by the defendants against disclosing prices which the group of handlers, of which Aarun J. Rubenfeld is the head, received in the New Jersey market, where most of his direct sales of fluid milk was made and where 99½ percent of all the milk from the State Hill plant was sold as fluid milk.

It hardly admits of doubt that higher prices were received in the New Jersey market were fixed selling and resale prices have long been maintained than in the Metropolitan market area where unbridled competition exists.

It is quite true, as urged, that the defendants might have applied to the Secretary of Agriculture for a modification of Order No. 27 in some or all of the respects in which they are aggrieved thereby.

But it is not to be supposed that there could be quick action upon such an application for modification of the order and in the meantime great detriment might result to the handlers.

The handler must comply with the order during such time as it takes for the Secretary to entertain, hear, and decide the application for modification of the order and for such further time as it takes for a Court to decide whether modification should have been granted.

The statute also provides:

See also *U. S.* vs. *Melvin Child Andrews* (D. C. Mass., January 18, 1939, not yet reported) where any substantial amount of money is involved administrative relief is of little value.

But the order could not be amended in the two most important particulars, viz, cooperatives are exempt from payment of the uniform price to producers and the order is required to permit cooperatives to blend prices received in outside markets with prices received in the marketing area. Adjustment through a scheme such as the Producers' Settlement Fund is also provided by the statute so administrative relief would be futile.

Furthermore it is the Government and not the handler which brings this suit. Also, the power

does not lie with Congress to require one whose property is being taken in violation of the 5th amendment to pursue some prescribed administrative remedy during which time his property continues to be taken before he can apply to the Courts for protection and relief.

In a proper case, immediate resort to the Courts cannot be denied for any reason whatever.

The things of which defendant Jetter most complains are the provisions of the directing statute that cooperative associations need not pay the uniform price to producers which is contained in Section 8 (c) (5) (f), the only limitation being that such a cooperative shall not sell its milk products to any handler for less than the fixed uniform price.

This section also provides for the blending of the net profits of all these sales in all markets and in all use classifications. These are two of the things which are most discriminatory.

Article 7, Section 1, provides that all handlers other than cooperative associations shall pay producers not less than the uniform price. It is by the construction and operation of this act that the cooperatives do not pay the uniform price, and may blend the price of milk sold outside of the State and in other classifications with fluid milk sold in the marketing area and thereby reduce the price paid by them to producers which is never, even for fluid milk, the price required to be paid by proprietary handlers.

The cooperatives also receive payments out of the Producers Settlement Fund that are denied to the proprietary handlers, sometimes amounting to as much as five cents per cwt.

The cooperative handlers may charge to the producers and deduct from the price paid for the milk, expenses of plant operation which run from 15 to 20 cents per cwt. of fluid milk. Proprietary handlers cannot make such deductions of amounts paid for expenses of operation themselves.

While all handlers are allowed 23 cents per cwt. plus transportation costs for milk received at each station equipped only for receiving and shipping milk and transporting the same to another plant where it is utilized for other than fluid milk purposes, only the large cooperatives and large proprietary dealers are equipped to received this 23 cents charge.

Cooperatives which are also milk dealers or handlers, may and do pay their producers less than the uniform price and from their payments into the Producers Settlement Fund, if any, they receive payments back for services, which proprietary handlers cannot, and do not, receive.

In fact, there is very little that a proprietary handler, who does not sell any milk outside the marketing area, and who has no plant to which he can transfer surplus milk, can do to recoup his losses. He cannot reduce his price by "blending" a fictitious value on "unpriced" milk with that sold in the area. He has no unpriced milk. He has no manufacturing plant, and may possess neither capital or inclination to enter the manufacturing field already principally covered by Dairymen's League, Bordens, National, and some of the larger independents.

The discrimination between the small proprietary handlers and the Dairymen's League will be

manifest from the following illustration of the comparative operation of the statute as applied in Order No. 27 as it affects the defendant, Jetter Dairy Company, and the Dairymen's League. The figures include all the differentials in favor of the cooperatives.

The loss per quart is from 1 to 1½ cents per day for milk sold in the market area.

Jetter sells 40,000 quarts per day, all in the marketing area, at a loss of $400.00 to $600.00 per day because required to pay the uniform price to producers.

The Dairymen's League sells about 1,640,000 quarts per day, or 41 times as much as Jetter. Dairymen's League sells without loss, for what it does not gain from sales in New Jersey and other out-of-State markets, together with the service and other differentials, it may deduct from its producers because it is not required to pay the uniform price.

> Jetter owes to Producers Settlement Fund for September and October, $30,000. (September payment has been made.)
>
> Dairymen's League paid to Producers Settlement Fund for September and October, $110,000.

or only about 3½ times as much as Jetter.

Dairymen's League received from the Producers Settlement Fund under Article VII, paragraph 5, in September $59,455.59, and in October $60,794.07, or a total of $120,239.66, which is about $10,000 more than it paid in.

In addition, it received from this fund under Article VII, section 6, in September $91,630 and in October $73,994, making a total of $165,524.

Adding this to the aforesaid $120,239.00, it makes a grand total of $285,763.

This is about $175,000 more than the Dairymen's League paid into the Producers Settlement Fund. Jetter received nothing. Jetter loses at a $400.00 to $600.00 per day loss, on a 30-day month, $12,000 to $18,000. In a year that amounts to $144,000 to $216,000. One year's payments into the fund at $15,000 per month would be $180,000. In less than a year it is practically certain that all the assets of the Jetter Company would be taken by the operation of the order, and it would have no funds or assets to pay producers or to make further payments into the fund. In short, its entire property would be confiscated. This is by force of the statute as applied in the order.

As a matter of fact, the defendant Jetter Company could not last a year. It had on April 1, 1938, only $50,000 capital and $30,000 surplus, or a total of $80,000. The taking of its capital at the rate of only $15,000 per month would exhaust its entire assets within 6 months.

Moreover, there is nothing to prevent the Dairymen's League and other large producers from further depressing the price of milk sold in the marketing area in order to capture the customers of competitors and thus forcing the Jetter Dairy Company and others in like situation out of business at an even more rapid rate.

The Dairymen's League Cooperative, however, could go on indefinitely for the statute and order are greatly discriminatory in favor of cooperatives, especially large ones, which can take advantage of all the opportunities it presents.

The property of the Jetter Company, and, of course, all other proprietary handlers and smaller cooperatives is thus taken by operation of statute and without the due process of law required by the Fifth Amendment.

This brings us to the consideration of the questions of law here involved, apart from the misrepresentations to producers in connection with the referendum.

The two most important questions of law are these:

1. Does this statute as applied in the order, in its operation under the conditions here existing, violate the Fifth Amendment to the Federal Constitution prohibiting the taking of property without due process of law?

2. Can the discriminations in favor of cooperatives be upheld under the circumstances here existing on the ground that producer cooperatives may legally receive the special preferential treatment provided in order 27?

It is held by high authority that even though a statute may be constitutional on its face, and may be valid when enacted or when given a particular application, it may be invalid under changed conditions or when given an application which results in arbitrary and prejudicial discrimination or when its operation results in the taking of property of one without compensation and transferring it to another.

Concordia Insurance Company v. *Illinois*, 299 U. S. 535, 545.

Borden Company v. *Baldwin*, 293 U. S. 194, 210. See also *Arrway Corp.* v. *Day*, 266 U. S. 71, 85.

Nebbia v. *New York*, 291 U. S. 502, 537.
Great Northern Ry. v. *Washington*, 300 U. S. 154.

The acts of Congress under the commerce clause are subject to the Fifth Amendment.

Currin v. *Wallace, supra.*
Railroad Retirement Act v. *Alton R. R.* 295 U. S. 330, 347.
Monongahela Navigation Co. v. *U. S.* 148 U. S. 312, 336.
U. S. v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 282 U. S. 311, 327.

Congress has not the power under the Commerce Clause, or otherwise, to take without compensation property of one and transfer it to another. And this is so, even though it be for a valid public purpose as is claimed here and as the statute intends.

Railroad Retirement Board v. *Alton*, 295 U. S. 330, 359.
Monongahela Nav. Co. v. *U. S.*, 148 U. S. 312, 336.
Louisville Joint Stock Bank v. *Radford*, 295 U. S. 555, 580, 602.

There can be little doubt that the statute, as applied in the order by means of the Producers Settlement Fund, takes the money from one group without compensation and transfers it to another, however disguised that transferring and taking may be, by representing it to be necessary to stabilize milk production and to take care of surplus milk.

The Milk Producers Settlement Fund here bears a close resemblance to the pooling fund, to which, under the Railroad Retirement, the large

carriers were required to contribute for the benefit of employees of the weaker roads.

That act was enacted under the commerce clause and was held to violate the Fifth Amendment because it took "the property or money of one and transferred (transferring) it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension the employees."

The money taken from one (Jetter) was in effect transferred to another (Dairymen's League and some other large cooperatives) for the benefit of the producers of such cooperatives and in effect for the benefit of those cooperatives themselves.

The Fifth Amendment is intended to protect the property and affairs of all citizens alike, regardless of all other considerations, and forbids the taking of the property of one without compensation and transferring it to another.

All the public purposes declared to be the object of the Railroad Retirement Act were set aside as no consequence in face of the Fifth Amendment. So here, the welfare of the producers and cooperatives, sought to be served by the agricultural marketing agreement act must be set aside, because here, as in the Alton case the property of one by the force of the statute and order, is taken and transferred to another in violation of the Fifth Amendment.

This case has analogy to *Thompson* v. *Consolidated Gas Utilities*, 300 U. S. 551, even though the statute there involved was a state statute.

The validity of the extractions from one for the benefit of the other cannot be supported by the so-called "pooling" cases upholding workmen's com-

pensation acts (*Mountain Timber Company* v. *Washington*, 243 U. S. 219; *N. Y. Central Railroad* v. *White*, 243 U. S. 188; nor by the statutes requiring banks to contribute to a common fund for insuring deposits (*Noble State Bank* v. *Haskell*, 219 U. S. 104; *Abie State Bank* v. *Bryan*, 282 U. S. 765).

These cases were cited in the Alton case and distinguished by Court and held without analogy.

In all those statutes there was a possible future benefit to be received by the one whose contribution was required. There is no possible benefit to be received here by the contributors.

The *New England Divisions Case*, 261 U. S. 184, and *Dayton-Goose Creek Railway* v. *U. S.*, 263 U. S. 456, are equally without application here. There a fair return either by rate or on the investment was provided. Here no fair return is provided. The requirements of the statute and order not only do not provide for a fair return or any return on the investment but in fact take the entire investment in periodic exactions.

These cases were also distinguished in the Alton case:

> *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, upon which some of the plaintiffs rely, has little application here.

There was no producers' settlement fund or other pooling arrangement for payments by one of the beneficiaries to another. The decision was influenced there by the failure of any showing by the plaintiff that his handicap in competition was not due to his own inefficiency.

There is no question of inefficiency, as has been shown.

It is said that the losses suffered by Jetter Dairy Company and others are caused by the competitive conditions in the marketing area and not by reason of the statute and order. It is the order under the statute which compels the proprietary handlers to make fixed payments to producers and other payments into the milk producers settlement fund and causes these large losses, while permitting cooperatives to pay what they please to producers and giving such cooperatives, especially large ones, other discriminatory preferences, both as to the amount paid into and withdrawn from the producers settlement fund. These grossly discriminatory provisions permit in such a competitive market by means of the settlement, the taking of the property of some and transferring to others without compensation and thereby eliminating them entirely from the competitive field.

This competitive condition was known when the statute was enacted and the order was issued, for it had long existed and could not be cured by any and all the previous attempts at remedy. These defendants have no power or control over these competitive conditions. Efficiency is not a factor.

This is not a case of "protecting a business against the hazards of competition" as plaintiff's counsel assert, citing *Hegeman Farms Corp.* vs. *Baldwin,* 293 U. S. *Supra.*

This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

Neither the order nor the statute made any attempt to remedy the competitive conditions and the operation of the order must have been foreseen.

In any event the statute as applied in the order brings the arbitrary discrimination and disaster hereinbefore shown.

Nebbia vs. *New York*, 291 U. S. 502, has little analogy. There the New York Statute fixed minimum prices for the sale of milk at retail and provided a penalty for violations. The case came before the court upon a conviction for selling under price.

The Court does in its opinion summarize the conclusions of the Legislative Committee respecting the milk industry of New York. These conclusions refer to the desirability of compelling an equal sharing of the burden of the surplus milk by all producers and distributors. These statements, however, are those of the committee and not of the Court.

Public Service Commission vs. *Great Northern Utility*, 289 U. S. 130, is inapplicable. In that case there was in the first instance no allegation and no proof that the rates prescribed were confiscatory. Amendment to allege confiscation but without proof, was held unavailing.

There are no decisions of any appellate Court upholding such an order as this under provisions of this statute.

U. S. vs. *David Buttrick Company*, 91 Fed. (2nd) 66, C. C. A. 1, merely decided that the provisions of the agricultural adjustment act relating to milk were not covered by the decision in *U. S.* vs. *Butler*, 297 U. S. 1, which declared other provisions of that act void.

The district court had held the whole act void under the Butler case and the Circuit Court of Ap-

peals reversed and sent the case back for trial. The case related to the statute before its amendment in 1937.

In *Hood & Sons, et al.* vs. *U. S.*, 97 Fed. (2nd) 677, C. C. A. 1, the District Court granted a temporary mandatory injunction of the same kind sought here.

On appeal the C. C. A. modified the injunction and directed the payment into the registry of the Court of the moneys required under the temporary injunction to be paid to the market administrator. The C. C. A. held that the defenses were not frivolous and should be heard by the District Court before final decision.

In *Whittenberg, et al.* vs. *U. S.*, 100 Fed. (2nd) 520, the Secretary of Agriculture brought suit against a handler of citrus fruits in Texas from violating the order there involved. There more than 50% of the handlers had signed the marketing agreement and the order was approved by two-thirds of the producers.

The Secretary made weekly regulations forbidding shippers to ship in interstate commerce and to Canada grape fruit below stated standards of *size* and *quality*.

The Court held the provisions of the act constitutional.

The Court relied chiefly on *U. S.* vs. *Buttrick*, 91 Fed. (2nd) 66, *Supra*, and *Edwards* vs. *U. S.*, 91 Fed. (2nd) 767, later referred to and on the *Currin case*, 93 Fed. (2nd) 856 (Affirmed by the Supreme Court).

It will be noted that there was no equalization fund or producers settlement fund as here and no differentials or other discriminatory preferences.

The handler was not required to pay into any fund for transfer to others and the handler was on the same basis as all other handlers having inferior fruit.

Edwards vs. *U. S.*, 91 Fed. (2nd) 767 C. C. A. 9, contains no equalization scheme and no fund like the Producers Settlement Fund here into which one set of handlers are to pay into a fund to be transferred to other handlers. The order complained of there merely prorated the shipment of fruit in interstate commerce. It has little analogy to the order and conditions here.

Wallace vs. *Hudson Duncan Company*, 98 Fed. (2nd) C. C. A. 9,985, is not in strict analogy. The case related to unshelled walnuts.

In that case the order issued by the Secretary of Agriculture under the Agricultural Adjustment Act, as amended, and held valid by the Court required that a packer (not a grower):

> either (1) must sell or hold all the walnuts it acquires in the state of acquisition, or (2) export from the State not more than a percentage of its intended shipments determined (percentage) by the Secretary for each crop year—upon consideration of the delivery of the remainder of such intended crop export to a control board.
>
> The Board may sell the walnuts it received to purchasers abroad or to shellers within the United States, at prices fixed by the Board, or may elimmate all or part of them from the market by donation or sale to charitable institutions in the United States, with provisions that such sales or donations shall not enter the U. S. as unshelled walnuts.
>
> The Board also has power to release to interstate shipment through the contribut-

ing packers all or portions of the surplus delivered to it, if in its opinion, the proper control of the interstate market warrants it. The proceeds of the distribution of the surplus and payments of credit value by the shippers are to be ratably apportioned and distributed to them by the Board.

or (3) May export from the state all of its intended shipments upon consideration of a payment to the Board, not of what the Packer has sold them for, but for a certain "credit value" fixed for all shippers by the Board, of the surplus walnuts which would otherwise have been delivered to the Board.

While that order has seeming similarity to the order here involved there are distinguishing differences.

1. There is no discrimination among packers as there is among handlers here where cooperatives are given a decidedly preferential position.

2. There are no prices fixed to be paid to producers as is done here.

3. There the object is to maintain the price of walnuts in the interstate markets, while here the sole object is to secure a price to producers before the milk passes into interstate commerce and no thought is given to prices in the interstate market which are subject to cut-throat competition largely by those given a preferential status in the order.

4. There the packers who deliver walnuts to the Control Board, the proceeds of the sale of which, if sold are distributed ratably to the same packers who delivered to the Board, while here the payments out of the producers' settlement fund are not paid to handlers ratably, but on a plan involving preferential treatment based on whether or not the

handlers are cooperatives and whether they render services or not. Also here payments into the pool are subject to gross discrimination.

5. There the walnuts might be kept or sold in intrastate commerce free from the order. Here milk cannot be kept for it is highly perishable. Here, if sold in intrastate commerce in the marketing areas, it became subject to State Order No. 126 which provides for the same payment to the same producers' settlement fund.

In the *Hudson-Duncan* case the Court recognized that such a regulation would be violative of the 5th amendment if unreasonable, arbitrary, or capricious, citing *Nebbia* vs. *New York,* 291 U. S. 502, 525, but held that the regulation was reasonable with one judge dissenting. It will be seen that the *Hudson-Duncan* case has little analogy to the case at bar.

In *U. S.* vs. *Melvin Childs et al.,* D. C. Mass. (Jan. 18, 1939, not yet reported) mandatory injunction was granted to the Secretary requiring the defendants to pay into a milk-price equalization fund. Whether or not there was other discriminatory provisions such as exist here is not disclosed. The discussion relates chiefly to whether all the defendants were engaged in interstate commerce. The opinion discloses that the judge writing the opinion believed there should be uniformity of decision in the District Court of that district. That decision is not controlling or persuasive here.

U. S. vs. *Goldsmith Fruit Company,* 19 Fed. Supp. 147, upheld the order of the Secretary under the Act before its amendment in 1937. That order had practically none of the provisions here and the case is not analogous.

It is also in direct conflict with *Fosgate* vs. *Kirkland,* 19 Fed. Supp. 152, decided one month later in the same district, in which later opinion the Judge said he could not follow the Goldsmith case.

There apparently are no further decisions under the act which have any analogy to the order and the facts here existing.

The defendants make some further contentions which may be briefly considered. It is urged that no provision of the statute authorizes Articles VII, Sections 5 and 6 of the order.

These relate to payments of 5¢ per cwt. to cooperatives and market services of 23 cents per cwt. and transportation charges, both to cooperatives and proprietary handlers.

The court does not find any sections of the act which clearly and definitely authorize such payments. If there be none, the order does not comply with the statute and should not be enforced.

It is also urged that Congress in the Act has neither fixed the price to be paid to producers nor prescribed a formula for fixing such price. This is not free from doubt.

If, without prescribing the price or a formula for determining the price, the statute authorizes the Secretary with the approval of two-thirds of the producers to fix a price without laying down standards to be applied, then there seems no escape from the conclusion that the statute delegates to the Secretary and producers powers which are essentially legislative and such delegation of power is invalid whether the delegation is to the Secretary or the producers separately or to both together.

Carter vs. *Carter Coal Company*, 298 U. S. 310,

The case would then come within the decision of the Carter case rather than within *Currin* vs. *Wallace, Supra.*

Since the decision may be reached on other grounds, this question need not be decided.

Plaintiffs cite many statutes, both State and Federal, providing for certain preferential treatment to producers and cooperative associations of producers, certain cases in which the validity of some of them have been upheld. But none of these statutes carry any such arbitrary, discriminatory provisions as the applicable provisions of the Agricultural Marketing Agreement Act and order 27. None take from one and transfer to another without compensation. Some are tax cases where producers selling their own products are classified differently from dealers who are not producers and exempted from a tax imposed on such dealers. Some relate to classifications of dealers or other persons not many of which relate to cooperatives.

Warehouse Company vs. *Tobacco Growers*, 276 U. S. 71 is the case most relied upon. A Kentucky statute aiming to assist agricultural producers in the orderly marketing of their crops, authorized the incorporation of nonprofit associations with membership confined to producers, to contract with their respective members for ten years to market the members' crops. It also provided that any warehouseman knowingly inducing such member to break his contract by receiving such members tobacco for sale or auction should be liable for a penalty of $500 to be recovered in a civil suit by

a cooperative. The Supreme Court upheld a judgment so recovered. The lack of analogy is clear.

In *Frost* vs. *Corporation Comm.*, 278 U. S. 515, the discrimination in favor of cooperatives there involved was held to be unconstitutional.

Chicago Board of Trade vs. *Olsen*, 262 U. S. 1, has no analogy.

In *Eisenberg Farms, Inc.* vs. *Baldwin*, 265 N. Y. 662, it was contended that the New York Milk Control Law was unconstitutional because it failed to require cooperative associations to return to their producers the prices fixed by the state milk control law. The Court of Appeals sustained the statute, but without opinion. The decision in the Eisenberg case was explained, however, by the Court of Appeals in Matter of *Mayflower Farms, Inc.* vs. *Baldwin*, 267 N. Y. 9, 12, as follows:

> In Matter of *Eisenberg Farms, Inc.* vs. *Baldwin* (265 N. Y. 662), this Court decided that the differential clauses in favor of cooperative associations which permitted them to pay to producers less than the price fixed by the Commission for milk was Constitutional.

It may be said that the Court in 265 N. Y. 662 wrote no such opinion but did uphold the lower court so deciding.

The discrimination in favor of cooperatives in that statute is but a small matter compared to the comprehensive discriminatory scheme provided in the Marketing Act and Order 27, and can have little bearing here.

There is no need to prolong the discussion of statutes or decisions relating to cooperatives. There are no authoritative cases upholding any

such discrimination in favor of cooperatives as here exists. None say that the 5th amendment permits one to be treated differently from another. The defendant cooperatives are not quite in the same situation as the Jetter Dairy Company. It is quite true, as the Government contends, that they may not complain of any preferential treatment of cooperatives of which they may take advantage.

> But there seems no good reason why they may not complain of discriminatory preferences of which only the large dealers, cooperative and proprietary handlers, may avail themselves, such as the 23 cents per cwt. for transfer of milk from a nonmanufacturing to a manufacturing plant, the blending of prices for which unpriced milk may be sold in New Jersey and other nonmarketing area markets with prices of milk sold in the marketing area. They can avail themselves of none of these preferential provisions of statute and order.

The order is also discriminatory as against them. They pay money which would otherwise be distributed to their producers to the Settlement Fund, in order that it may be paid out to the large cooperatives and large proprietary handlers. They are forbidden by law to sell milk in the area at less than the prices fixed by the order. They are also required to pay into the Producers' Settlement Fund to provide preferential payments made to producers living in 18 counties, under the provisions of Article 6, Section 8. The producers in those counties receive 20¢ per cwt. in addition to the locational differentials which return them a higher price for their milk because they are located nearer

New York. By this means, moneys of the Rock Royal and the Schuyler Junction and Central New York Cooperatives are taken to be given to other producers, for the most part, delivering to the three large proprietary and cooperative handlers, without compensation to these small defendants.

If they pay into the producers' settlement fund on the order basis they like also the smaller proprietary handlers, though in lesser degree, suffer confiscation of their property by the same taking from one and transferring to another.

There can be little doubt that under the situation existing when the order became effective, the large dealers doing 70% of the business in the marketing area enjoy discriminatory preferential treatment over most of the handlers doing the remaining 30% of the business.

There remains to be considered the separate contention of the defendant Central New York Cooperative. This defendant contends that it does not come within the terms of the order because as a cooperative marketing association it merely acts as an agent for the producers in marketing their milk; that their legal status is that of producers marketing their own milk, which, if true, removes them from the operation of the order.

Central New York Cooperative has paid uniform prices to its producers and has left after such payments and payments of all expenses a sum not exceeding half the amounts fixed by the administrator for payment into the Producer Settlement Fund for each month.

This cooperative is incorporated under the laws of the State, rents milk receiving plants, where, as it contends, it receives milk as their agent, from

producers who are members and some others under contract with it and still as agent delivers the milk to other agents who are wholly owned subsidiary corporations, who sell to stores and retail distributors. The proceeds of the sale come back to the defendant cooperative, presumably less the expense of the selling agents and are paid to the producers less the expense of operating the receiving plants.

Such a claim that the Central New York Cooperative and its subsidiary corporations are merely agents for the producers is somewhat difficult to accept. This cooperative owns no farms or cows and directly produces no milk.

The Government contends that such a cooperative is a handler within the definition of handler and therefore liable for payment into the producers settlement fund. It is not free from doubt that such a definition is entirely supported by the statute. Moreover, under a similar contract it has been held that such a relation is one of joint venture and not a sale.

Rhodes vs. *Little Falls Dairy,* 230 A. D. 571, Affirmed in 256 N. Y. 559.

It is, however, not necessary to decide this question, for even as a cooperative handler, Central New York Cooperative suffers the same discriminatory treatment as the other defendant cooperatives who by reason of the fact that they cannot avail themselves of all the opportunities for withdrawal from the Producers Settlement Fund that are enjoyed by the Dairymen's League and other large handlers selling in the New Jersey Market and receiving the other preferential differentials,

find their property taken under the order without compensation and transferred to another.

The final conclusion is that the statute, as applied in the order, is unconstitutional as to all the defendants in its application to the situation and conditions here existing and that the order was not approved in accordance with the provisions of the statute and should not be enforced.

Judgment may be entered dismissing the complaints as to all defendants, with one bill of costs against the Dairymen's League and Metropolitan Bargaining Agency. February 23, 1939.

EXHIBIT C

United States District Court, Northern District of New York

UNITED STATES OF AMERICA, PLAINTIFF, AND HOLTON V. NOYES, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, INTERVENING PLAINTIFF

vs.

ROCK ROYAL CO-OPERATIVE, INC., ET AL.

John S. L. Yost, Charles J. McCarthy, Special Assistants to the Attorney General.

Ralph L. Emmons, United States Attorney.

Harold L. Schilz, Special Assistant to the Attorney General.

E. O. Mather, Senior Attorney, Dept. of Agriculture.

Milo R. Kniffen, Counsel, Department of Agriculture and Markets of the State of New York.

Robert G. Blabey, Assistant Counsel.

Willard R. Pratt, Utica, N. Y.; Charles W. Jenkins, Deposit, N. Y.; Haskell & Foley, Cortland, N. Y.; Attorneys for Defendants.

COOPER, J.: This is a motion by the plaintiff to strike from the answer of the defendant Jetter Dairy Company, Inc., and of other defendants, certain paragraphs relating chiefly to affirmative defenses.

The grounds of the motion are that said paragraphs:

(a) Fail to state a legal defense to plaintiff's claim, and

(b) Contain only allegations which are redundant, immaterial, impertinent, and scandalous.

The intervening plaintiff makes a like motion on the same grounds to strike out the same paragraphs.

The Jetter Dairy Company, Inc., is a New York State Corporation engaged in the business of buying fluid milk from producers and selling it to consumers through a jointly owned subsidiary corporation.

On August 5th, 1938, the Secretary of Agriculture of the United States, hereinafter called the Secretary, issued Order No. 27, effective Sept. 1, 1938, under the provisions of the Agricultural Marketing Agreement Act as amended in 1937. This order was to be carried out under the direction of a market administrator appointed by the Secretary.

Among other things Order 27 provided that the method for the fixing of prices monthly for prices to be paid to the producers and for the establishment of a so-called Milk Pool to which these handlers (meaning those who buy from the producers and sell to distributors or sell directly to consumers) should pay or from which they should receive certain sums fixed by the Market Administrator, depending upon the use to which the milk received from the producers was put under the various classified uses specified in Order No. 27.

The Market Administrator determined upon the basis of the reports made by the defendant Jetter Dairy Company and other defendants that certain payments were due from the Jetter Dairy Company and the other three defendants.

This action is brought by the Government to compel payment of such moneys by injunction.

A like order was issued by the State Commissioner of Agriculture hereinafter called the Commissioner under State Statutes intended to bring about joint milk control, and price fixing in cooperation with the Secretary.

The same person appointed Federal Administrator was appointed State Administrator to make more effective the joint Federal and State Control of the production and distribution of milk.

The State Commissioners' complaint seeks to compel like action if the milk is sold in intrastate and not interstate commerce, the Federal Act applying only to milk sold in interstate commerce or directly affecting interstate commerce.

It is conceded that the milk of the Jetter Dairy Company is sold in Interstate Commerce because it passes through New Jersey in going from farm to market. For present purposes it will be assumed that the milk of all defendants is sold in interstate commerce.

When it is sought to obtain the order of a Court of Equity requiring citizens to obey an order of an administrative or executive department of the Government, the conscience of the Court must be satisfied that the order should be issued. As sometimes stated, the order is in the sound discretion of the Court.

If it were otherwise, resort to a court would not be necessary.

Morrison v. *Work,* 266 U. S. 481.

Virginia Railway Co. v. *System Fed.,* 84 Fed (2nd) 641.

McNulty v. *National Mediation Board,* 18 Fed Sup. 494.

The motion is to strike out the balance of the answer from paragraphs 25 to 35 inclusive. Paragraph 25 of the defendants amended answer alleges the incorporation of the Metropolitan Incorporated Milk Products Bargaining Agency with the Dairymen's League, Sheffield Incorporated and others.

It further alleges that agents of the Metropolitan Agency procured the formation of an incorporated association among milk producers delivering milk to independent nonincorporated handlers and that such corporations so formed were neither dealers, handlers nor bona fide corporations within the Federal Law.

Paragraph 26 alleges that the Metropolitan Bargaining Agency formed a scheme to procure competitive advantages for several large incorporated dealers over the independents, proprietary dealers such as the defendant Jetter Company and others and to establish a monopoly under the Metropolitan Bargaining Agency.

Paragraph 27 constituting the first affirmative defense alleges the joint referendum by Federal and State agencies upon proposed Federal Order 27 proposed by the Metropolitan Bargaining Agency and State order 126 and alleges misstatement contained in the public notice issued by the Secretary and misrepresentations by printed statements of the Metropolitan Cooperative Bargaining Agency and by the Dairymen's League (alleged to handle 40% of all milk received in the Metropolitan Marketing Area) and that these misstatements and misrepresentations were a fraud upon the producers and induced them to believe that the terms of the orders were other than they actually were.

There are certain further allegations of speeches, letters, or radio talks.

It is impracticable to refer to each of the remaining paragraphs of the answer, but it may be said that paragraphs 27 to 35 inclusive set forth defenses of these kinds, viz:

1. Order 27 is invalid because it failed to comply with the Federal Statute under which it was issued; viz, the Agricultural Marketing Agreement Act of 1937.

The grounds are chiefly these:

The handlers having failed to approve the proposed order No. 27 the Act required a finding by the Secretary that two-thirds of the Producers favor the Order and permits a referendum of producers to determine such approval.

That the secretary directed the referendum to be conducted and such vote as was had in favor of the order was induced by misunderstanding or misrepresentations as to the terms and effect of order 27 and that the referendum, therefore, did not give true expression of approval by the producers and the Secretary's finding, therefore, based on the Referendum for the promulgation of the order was without any actual or substantial support.

The defendant's argument appears to be that the secretary having elected to ascertain the approval of the producers by the Referendum, cannot reply upon hearings or any other means of ascertaining the approval of the producers. That the order is not such as it was represented to be and has various discriminatory, confiscatory, and other unconstitutional provisions and effects referred to hereinafter and that a Court of Equity cannot in good conscience find that the order was promul-

gated in accordance with the statute nor that it should be enforced.

Defendant's cite, to support their contention, among others:

Butler vs. *U. S.*, 78 Fed. (2nd) 1, Affirmed, 297 U. S. 1.

Scheter vs. *U. S.*, 285 U. S. 495.

Di Giovanni vs. *Camden F. I. Company*, 296 U. S. 64, 73.

and certain railroad cases holding that in the absence of a finding of essential facts the order cannot be sustained.

Plaintiff urges that defendants nowhere allege that the result of the referendum would have been different had no such representations been made.

Assuming that there is no such specific allegation, the unmistakable and necessary inference to be drawn from defendant's affirmative allegations is to that effect.

The pleading on such a motion as this must be given every fair intendment that may be drawn therefrom.

Plaintiff urges that the affirmative defenses are not a simple, concise and direct pleading but are prelux, redundant, scandalous and state no defense and constitute no defense.

Plaintiffs cite the N. Y. Civil Practice Act 8 (e) and the Federal Practice act and cases such as

Cantanzaritti vs. *Bedrin* (Nor. Dist. Pa.), Not yet Reported.

Polk vs. *Mutual Reserve Fund*, 128 Fed. 524, and many cases relating to invulnerability from attack of legislative bodies and public officers.

This Court agrees that the motive behind the Legislation cannot be attacked for if the Courts

could inquire into such subject, there would be danger of invasion by the Judicial branch upon the legislative branch of three branch constitutional form of Government.

The same is true in large measure of the Acts of Administrative Offices but here the statute is the guide and apart from motive, acts not in compliance with the statute are not vaild or enforceable.

The plaintiff also urges upon the basis of a number of Supreme Court citations, including:

Johnson vs. *Drew,* 171 U. S. 93.
Williamsport vs. *U. S.,* 277 U. S. 551.
Douglas vs. *Noble,* 261 U. S. 165.
Red (c) Oil Company vs. *Board of Agriculture,* 224 U. S. 380.

that in a wide variety of situations discretionary administrative determinations of fact are conclusive, and that this order was such an administrative determination.

The statutes and the situations in those cases are not in close analogy.

The statutes here provided that the Secretary might avail himself of a Referendum to determine whether or not two-thirds of the producers approved the proposed order. Having done so that referendum should be held to be the basis of his action and if it was not in fact a referendum upon the proposed order the validity of the order may be affected thereby. Compliance with the statute is necessary to the validity of the order.

Fosgate Company vs. *Kirkland,* 19 Fed. (Supp.) 152, 160.

The defendant's allegations that the order was issued upon a referendum where the producers who

voted were misled as to its terms and effect cannot be said to have no legal status as a defense where if the allegations are true there was no other evidence before the Secretary justifying the promulgation of the order.

That there may be and perhaps is other support for the order which may be shown on the trial should not prevent the defendants from being given their day in Court.

The evidence the defendants may introduce upon the trial, however, must be documentary evidence and will not include any oral statements, radio speeches (unless the text thereof cannot be shown in writing by undisputable proof), nor letters to individuals but only letters shown to have been sent generally to producers or large numbers thereof.

The alleged publications, radio speeches, etc., of the Metropolitan Marketing Agency, Dairymen's League, etc., will be competent evidence if shown to have a large circulation among producers, or to have been delivered over well-known radio stations with the text preserved in writing.

It is quite true that the Secretary is not responsible for the Acts of the nongovernmental organizations, but the proposed order was admittedly suggested by the Metropolitan Bargaining Agency, of which the Dairymen's League and others are members and had representation upon its board. It is not so important that the Secretary did not send out such publications as it is whether he had knowledge and whether or not the Referendum vote was induced thereby.

In this connection the fact that the Dairymen's League, through its officers and not through its

members, could and did vote for approximately 20,000 producer members is not without significance.

The Secretary is not burdened to any extent with defending the acts of these nongovernmental agencies, for only evidence as to which there can be little or no dispute will be received and these agencies can be made parties hereto if they desire to present any evidence they desire, but only with the consent of the plaintiff.

2. The remaining defenses allege the invalidity of the order on constitutional grounds and on the grounds of discrimination, which results or may result, in driving all but the large cooperatives from the milk business.

The grounds are chiefly these:

(a) The order exempts Cooperative handlers from paying producers the uniform price required to be paid by noncooperative handlers and permits cooperative handlers to pay into the equalization fund a lesser base amount than noncooperative handlers.

(b) The order fixes low prices to three large groups of handlers for milk in the lower brackets (sold for other than fluid milk consumption) and is in effect a rebate which can be and is applied in reducing the price by these groups for fluid milk; which preferred handlers sell 70% of the milk sold in the marketing area; that the order permits three large groups to pay lower prices for fluid milk by permitting them to "blend" the price paid for milk sold in the marketing area, with the lower price paid for milk sold outside the marketing area, which latter price is not fixed in the order,

all of which results in a competitive advantage to these groups.

(c) That unfair freight differentials are fixed in the order not based on actual freight costs, which is discriminatory.

(d) That no sale price to consumers or to distributors being fixed in the order the foregoing discrimination above set forth and otherwise, permits the large dealers, or some of them, to reduce the price to those selling to consumers to a point below the costs of fluid milk to defendants and others in like situation to a point below the cost with the most efficient operation and that the order procured, it is alleged, by the large dealers particularly Dairymen's league, was designed by them to so permit the underselling of defendants and others in like situation at a price below cost for the purpose of driving them out of business and creating a monopoly in such large dealers, and the payments into the milk pool sought to be enforced by the complaint results in a confiscation of their property to the point of total confiscation.

(e) There are certain other allegations of illegal and unlawful delegation of power to a majority or two-thirds, which permits the majority or the two-thirds to regulate the business of the minority for the benefit of the majority or two-thirds in violation of fundamental law.

The power to fix in the order the price to be paid to producers is not challenged, nor the fixed price itself.

The numerous authorities cited on this point need not be considered.

The contention is that the same price is not fixed for all but discrimination is practiced in the vari-

ous ways above referred to, some of which appear on the face of the order and others of which can only be shown by proof.

Involved in this discrimination is the exactions of the milk pool which result in alleged discrimination in favor of certain large producers and against these defendants and others like them.

That a price fixing or price control when by reason of discrimination or otherwise it becomes an arbitrary discriminatory regulation having a demonstrably irrelevence to the legislative, is unconstitutional and an unwarranted interference with individual liberty is declared in *Nebbia* vs. *New York*, 291 U. S. 502, 539.

Plaintiff argues that the milk pool is only a stabilization fund by which the burden of the surplus may be shared by all producers and distributors citing *Nebbia* vs. *New York, Supra,* and various other cases.

But the defendants allege the milk pool as operated under and by the terms of the order is arbitrary and discriminatory and goes to the length of exacting from them, in connection with the price cutting by the big handlers and distributors especially cooperatives, and despite their effective operation, practically their entire capital assets in a series of periodic exactions.

Discrimination in favor of a cooperative association of farmers and laborers is not invalid but valid and approved, urges the plaintiff, citing:

Matter of Mayflower Farms vs. *Baldwin*, 267 N. Y. 912.

Liberty Warehouse Company vs. *Burley T. G. Coop. M. Assn.*, 276 U. S. 71, and other cases.

Some discrimination in favor of Farmer Cooperatives, when confined within reasonable limits, is undoubtedly valid, but, argues the defendants, a giant cooperative, controlling 40% of the milk supplied to the Metropolitan area and which uses its preferential treatment to combine with a few others to destroy competition and control the market is not the cooperative intended by the Statute, and in any event gets so much preference, under the whole scheme as to unlawfully take all of defendant's property if it would attempt to comply with the order.

Defendants, to support their contention that the exactions for the milk pool under the order and in effect by reason of discrimination and otherwise is to take defendants' property and give the same to other competitors, cite:

> *Thompson* vs. *Cons. Gas Company,* 300 U. S. 53.
>
> *Railroad Retirement Board* vs. *Alton R. R.,* 295 U. S. 330.
>
> *Louisville Joint Stock Land Bank* vs. *Radford,* 295 U. S. 555, and others.

These cases have no analogy of fact and are not under the Commerce clause except the *Alton* case.

The question under discussion is one that could best be decided upon the evidence when presented and upon facts to be found therefrom.

> *Borden Company* vs. *Baldwin,* 293 U. S. 194, 210, 213.

Moreover, a statute valid when enacted may become invalid by a change in the conditions to which it applies.

> *Adkins* vs. *Childs Hospital,* 294 U. S. 405, 415.

The defendants allege in substance that the tute delegates power to two-thirds of the pro-cers to make the order binding on the remaining ird and that such delegation is unlawful.

Defendants assert that the statute here is like at in *Carter* vs. *Carter Coal Company*, 298 U. S. 8, 310 where such delegation as was there in-lved was held in violation of the 5th amendment.

Plaintiff asserts that there is no such delegation power in the statute here involved as in the tute in the Carter Coal case and cites:

Edwards vs. *U. S.*, 91 Fed. (2d) 767.
U. S. vs. *Whittenburg*, 21 Fed. Supp. 713.
U. S. vs. *Goldsmith Fruit Company*, 19 Fed. Sup. p. 147.

However, the statute and an order thereunder ve been held to constitute invalid delegation of wer.

Fosgate Company vs. *Kirkland*, 19 Fed. Supp. 152.

It is not necessary to decide that question at this ne but such allegations should not be stricken om the answer; in view of the need for an early termination of this case it seems unnecessary and desirable to prolong the discussion of the de-nse since the Court is of the opinion that they ould not be stricken out but that the defendants ould have opportunity to present their defenses d the proof thereunder and that such defenses e not frivolous nor without some legal standing. Some present doubtful questions, where the ques-ns involved can best be decided on the evidence om which facts can be found. Especially is this where the suit in equity is to enforce an order.

The Court does not intend by this decision to express any opinion on the merits of the defenses but merely that they should not be stricken out on the grounds stated in the motion.

The Court understands that the defenses in all cases are or are to be the same.

Any questions of difference in standing on the part of the defendants appear not to be urged and are not now decided.

The motions are denied.

DECEMBER 22, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939